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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT BOSTON, Defendant and Appellant.	B290898 (Los Angeles County Super. Ct. No. BA447182)

APPEAL from the judgment of the Superior Court of Los Angeles County. David V. Herriford, Judge. Affirmed.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Robert Boston was convicted by jury of one count of lewd act upon a child and sentenced to six years in prison. He challenges his conviction, contending that prior acts evidence was improperly admitted and that there is no substantial evidence demonstrating the requisite intent.[1]

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with one count of committing a lewd act upon a child under the age of 14 in violation of Penal Code section 288, subdivision (a). The case proceeded to a jury trial in March 2018. The testimony and evidence at trial established the following facts.

On May 31, 2016, 12-year-old Diana M. was walking home from school, alone. She had just passed the Food 4 Less grocery store on the corner and was headed to her home which was several houses down the street. She saw defendant standing outside his home across the street looking at her. Diana knew defendant as a neighbor and would wave hello to him, but otherwise did not interact with him.

Defendant, who was not wearing a shirt, said "hi" to Diana and waved his hand at her, beckoning her to cross the street. At the time, she had no reason to believe he would harm her, so she took a few steps in his direction and then he walked across the street. When he got up to her, he immediately put his arm

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[1] In his reply brief, defendant withdrew his argument based on Penal Code section 1001.36, explaining that during the pendency of this appeal the statute was amended to exclude mental health diversion as a sentencing option for anyone convicted of a violation of section 288. (Stats. 2018, ch. 1005, § 1, eff. Jan. 1, 2019.)

around her shoulder and held onto her with a "firm grip." It made Diana feel "uncomfortable."

Still grasping her with his arm, defendant asked Diana if she had seen the two other girls walking ahead of her holding hands. She said yes but did not understand why he mentioned them. Defendant then leaned his head down, acting like he was going to kiss her. Diana, who was wearing a hoodie, ducked her head and defendant's kiss landed on her hoodie, just near her hairline. Defendant grabbed Diana's checks and pressed them together, causing her lips to pucker and purse. He started to tilt Diana's chin up toward his face. It looked to Diana like defendant was "going to kiss [her]."

Diana was frightened. She quickly covered her mouth with her hand and defendant stopped. He said something about candy but she could not recall exactly what he said. Diana pushed defendant and started running toward her house. She could hear defendant's footsteps behind her and knew he was following her. He kept yelling at her to "stop running" and "come back." Diana was scared he would catch her before she could get safely inside.

When Diana got inside her home, she told her grandmother what happened. Diana was crying and her grandmother tried to calm her down. Her grandmother then went outside and spoke to defendant who was standing at the driveway. From the door of the house, Diana saw defendant talking to her grandmother. She heard him say he was sorry. Diana's grandmother told him she was going to call the police. Defendant walked away.

Diana's friend came over and asked her what was going on. Diana, still crying, explained what happened. Diana's friend called 911. The 911 call in which Diana could be heard crying was played for the jury.

The police officers arrived about 15 minutes later. Diana was still very upset and crying as she explained to them what happened. They detained defendant and she identified him in a field show up. Diana also identified defendant in court.

Marlee D. testified that in June 2015, she was 18 years old and an employee at the Food 4 Less grocery store. Defendant was a regular customer at the store and when she first started noticing him, he would pay her a compliment but did not act unusual. However, defendant then started saying more crude things, like a "pervert." He would see her in the aisle, walk up close to her and say "MM-MM-MM," talk about her buttocks, and say "hey baby, why are you running from me" and "give [me] a chance." Then, one day in the parking lot of the store, he brushed by her and his open hand touched her buttocks. Defendant made her feel "uncomfortable" and she told her manager. The next time defendant said something to her in the store, her manager called the police. Defendant also cursed a lot in the store, was loud and disruptive, and told female employees to "suck my you know what," so he was banned from coming inside the store.

Defendant did not call any witnesses but testified in his own defense. He explained he took special education classes in school and has always been "slow." He was in a car accident and went through the windshield, suffering head injuries that required a plate being put in his head. He was also attacked by a robber, who hit him in the head with a piece of lumber. Defendant said his memory got worse with the head injuries he suffered.

Defendant said he was 54 years old. In 2016, he was living with his nephew who handled his money. Defendant said he received SSI benefits and was no longer working. He admitted a

2001 conviction for forgery, a 2009 conviction for possession of marijuana for sale, and a 2010 misdemeanor conviction for driving while under the influence. He said he was driving after having taken pain medications related to his head injuries.

Defendant said that on May 31, 2016, he saw Diana walking home from school, but he denied Diana's version of what occurred. He said he knew Diana's grandmother and he often exchanged greetings with Diana and her grandmother. He said Diana was crying as she walked by that day so he asked her what was wrong. She told him someone was following her. He put his arm around her and kissed her on her head trying to calm her, like he would do with his own children. Defendant said he had 10 children of his own, including five daughters, and he often tried to comfort his children that way. Defendant said he then told Diana to go home. He denied trying to kiss her on the mouth, grabbing her cheeks or following her home.

Defendant said it is not appropriate for a grown man to kiss a 12-year-old girl on the mouth, and he said he did not have any sexual interest in young girls.

Defendant also denied inappropriately touching Marlee. He said he used to just flirt with her, nothing more. He recalled bumping into her in the parking lot one day, but it was nothing more than that. He said if his hands touched her at all, it was an accident and he was sorry.

The jury found defendant guilty as charged. The court sentenced defendant to the midterm of six years. The court awarded defendant 801 days of presentence custody credits and imposed various fines and fees not at issue in this appeal.

This appeal followed.

DISCUSSION

1. Prior Acts Evidence

Defendant contends the court committed prejudicial evidentiary error by admitting the testimony of Marlee regarding the incidents with defendant in 2015 at the Food 4 Less store. We disagree.

We review the trial court's order admitting evidence pursuant to Evidence Code section 1108 for abuse of discretion. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 374-375 [trial courts are vested with broad discretion in determining the admissibility of evidence under § 352].) We find no such abuse here.

In a pretrial motion, the prosecution sought an order allowing the admission of five prior uncharged acts of sexual offenses by defendant dating back to 1999. At the hearing on the motion, the prosecution reported that it would not be seeking to introduce two of the prior acts based on conversations with the alleged victims. After entertaining argument, the court allowed the prosecution to offer two of the prior acts, explaining that they both involved unwanted sexual advances made toward women who were substantially younger than defendant. The court found the evidence would not be unduly time-consuming or confusing, and stated that it would give appropriate instructions on prior acts evidence. At trial, the prosecution presented only the testimony of Marlee and did not put on the other alleged victim.

Evidence Code section 1108 provides, in relevant part, that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to

Section 352." (*Id.,* subd. (a).) Such evidence may be offered to raise an inference that "the defendant is predisposed to commit sex offenses." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.) "The evidence is presumed admissible and is to be excluded only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters." (*People v. Cordova* (2015) 62 Cal.4th 104, 132.)

The record reflects the trial court engaged in the requisite balancing of probative versus prejudicial value. Having done so, the court reasonably concluded the incident with Marlee was admissible. It was close in time, having occurred less than a year before the charged offense. Marlee was also a young woman of just 18 years old, older than the victim here, but still significantly younger than defendant. The incidents were substantially similar in that defendant approached both victims and made unwanted sexual advances, and later denied any sexual intent. Marlee's testimony was relatively brief (13 pages of trial transcript) and was not more inflammatory than the charged offense given the fact she was older than the victim here.

" 'Evidence is substantially more prejudicial than probative [citation] if . . . it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' " (*People v. Lindberg* (2008) 45 Cal.4th 1, 49.) We see no such risk from the admission of the testimony of Marlee.

Defendant argues the conduct described by Marlee was not a sexual offense, but amounted at most to verbal harassment, and therefore should not have been allowed under the statute. Defendant did not make any specific objection to any testimony by Marlee on that basis. Moreover, while Marlee did describe

defendant's verbal actions, she explained them in the overall context of how he would pursue her and walk up close to her in the store, before describing the incident in the parking lot where he touched her buttocks. She testified about how it made her uncomfortable and fearful. The trial court acted well within its discretion in admitting the evidence.

As for defendant's claim counsel was ineffective for failing to object to specific aspects of Marlee's testimony, we find defendant has failed to make the requisite showing to establish ineffective assistance. (*People v. Gray* (2005) 37 Cal.4th 168, 207 [the record "sheds no light on why counsel acted or failed to act in the manner challenged," thus the claim is "more appropriately raised in a petition for writ of habeas corpus"].) Moreover, the failure to raise objections during trial "rarely constitutes constitutionally ineffective legal representation." (*Ibid*.)

2. Evidence of Intent

Defendant also contends the record lacks substantial evidence he touched Diana with any lewd or improper intent. We are not persuaded.

"[T]he courts have long indicated that [Penal Code] section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.] '[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done. . . . If [the] intent of the act, *although it may have the outward appearance of innocence*, is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it

stands condemned by the statute . . . .' [Citation.]" (*People v. Martinez* (1995) 11 Cal.4th 434, 444 (*Martinez*).)

Plainly put, Penal Code section 288 forbids any touching of a child under the age of 14, so long as it is done with the present intent of sexual gratification. (*Martinez*, *supra*, 11 Cal.4th at p. 444.) "Conviction under the statute has never depended upon contact with the bare skin or 'private parts' of the defendant or the victim." (*Ibid*.) "[A] lewd or lascivious act can occur through the victim's clothing and can involve 'any part' of the victim's body." (*Ibid*.)

As *Martinez* explained, the manner of touching *is* relevant however, to the trier of fact's evaluation of whether the requisite intent exists. " '[T]he trier of fact looks to all the circumstances, including the charged act, to determine whether it was performed with the required specific intent.' [Citations.] Other relevant factors can include the defendant's extrajudicial statements [citation], other acts of lewd conduct admitted or charged in the case [citations], the relationship of the parties [citation], and any coercion, bribery, or deceit used to obtain the victim's cooperation or to avoid detection [citation]." (*Martinez*, *supra*, 11 Cal.4th at p. 445.)

Here, the record established that defendant knew Diana from the neighborhood and had waved hello to her on numerous occasions. Diana testified she basically trusted defendant or at least did not suspect he intended her any harm. Thereafter, defendant approached Diana and, grabbed her firmly around the shoulders, holding onto her tightly and against her will. Defendant made two attempts to kiss Diana, grabbing her face at one point, and apparently attempting to placate her with an offer of candy when she blocked his second attempt. There was also

the evidence of prior similar unwelcome sexual conduct toward Marlee. The evidence was ample to support the jury's conclusion that defendant touched Diana with the requisite lewd intent. Defendant's argument improperly requests a reweighing of the evidence which we will not indulge.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

WILEY, J.